

HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

-
WRIT PETITION No.28847 of 1995

-
Dated: .02.2007
-

Between:

K.S. Verma

.. Petitioner

And

Union of India, rep., by its
Secretary for Defence, South Block,
New Delhi & others.

.. Respondents

-
-
-
-
-
-
-
-
-

-
-
-
-
-
-
-
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

-
WRIT PETITION No.28847 of 1995

-
-
ORDER:

This writ petition is filed by the petitioner feeling aggrieved with the action of the respondents in denying him promotion to the rank of Naib Subedar. While seeking invalidation of this action of the respondents, the petitioner also sought for a direction to the respondents to promote him to the rank of Naib Subedar with effect from the date of promotion of his juniors and to grant all consequential benefits.

The facts in brief are that the petitioner was enrolled in the army on 24.07.1979. After his initial training and trade training he was posted to various units as General Duty Clerk. The petitioner was promoted to the rank of LN.Naik in the year 1982 and as Naik in the year 1983. He was promoted as Havaladar in the year 1985. The petitioner claims that he is qualified in HNS cadre course for promotion to Naib Subedar from Havaladar and also passed out the NCO clerk course, which is also a qualifying course for promotion to Naib Subedar. The petitioner claims and it is not denied that he rendered himself eligible for promotion to the post of Naib Subedar during the year 1998; but he was denied promotion though some of

his juniors were promoted with effect from 01.04.1995.

The petitioner averred that he joined the unit of Commanding Officer, 3 Training Battalion, 1 EME Centre, Secunderabad, the 5th respondent, on 13.04.1994 and was continuing in the said unit till the date of filing the writ petition. He also averred that during his entire service of 16 years, he earned very good reports in the ACRs and was never officially informed of any adverse remarks pertaining to any of his confidential reports. The army headquarters issued proceedings No.B/33513/AG, PS 2(e) dated 18.01.1993 wherein criteria for promotion to all the ranks in the army other than office cadre was prescribed. According to the said criteria, a person is eligible for promotion to the rank of Naib Subedar after he earned atleast three entries of "above average" and two entries of "high average" in his ACRs. The petitioner further stated that according to his information all his confidential reports up to 1993 were "above average" (higher than "high average") and even his confidential report for the year 1994, which was initiated by his initiating officer was graded as "above average". However, the petitioner's reviewing officer brought down the said entry of "above average" to 'average'. The petitioner contended that he was neither informed about any adverse reports nor any signatures were obtained from him on the ACR for the year 1994 in respect of altered entry. As the petitioner whose confidential report for the year 1994 was entered in October 1994 was expecting his promotion with effect from 01.04.1995, he was denied the same while some of his juniors were promoted and thus he came to know that in view of the

revision of entry to 'average' from "above average", he was rendered disqualified to be considered for promotion to the post of Naib Subedar. The petitioner therefore assails this action of altering the entry in the ACR as wholly arbitrary, illegal and in violation of principles of natural justice.

Brigadier RS Batra, Commandant in 1 EME Centre, the 5th respondent, filed a counter-affidavit on behalf of the respondents. While the averments made by the petitioner relating to his service particulars were not denied, it is mentioned in the counter-affidavit that the petitioner was not promoted to the rank of Naib Subedar during 1995 on account of the fact that for the year 1994 he earned the entry of 'average'. It is further stated in the counter-affidavit that the petitioner's ACRs for the year 1994 were initiated by an officer under whom he functioned for only 20 days against a stipulated period of 90 days. On account of the same, fresh ACR was initiated by the officer under whom the petitioner functioned for a longer period of (90 days) 1994 and he gave 'average' grading to the petitioner for that year. It was also claimed in the counter-affidavit that the same was duly communicated to the petitioner on 30.06.1995. While reiterating the fact that the petitioner was communicated with the adverse remark on 30.06.1995, the deponent of the counter-affidavit denied the allegation of the respondents' failure to inform the petitioner of the circumstances leading to the initiation of second ACR during the year 1994.

I have heard Sri S.Krishna, learned counsel for the petitioner and Sri A.Rajashekar Reddy, learned Assistant Solicitor

General appearing for the respondents.

Sri S. Krishna contended that Major K.K. Singh, Company Commander was the officer under whom the petitioner worked for a substantial period during the year 1994 and as he was the officer, who had the opportunity of assessing the performance of the petitioner, rightly initiated his ACR for the year 1994 and awarded him "above average" for that year. The learned counsel further submitted that though technically the petitioner was posted to 'R' Company on 16.04.1994, due to administrative exigencies, the petitioner was allowed to work in 'T' Company, under the control of Major K.K. Singh till 10.09.1994 and therefore as the petitioner worked for more than the stipulated period of 90 days under the said officer, he was legally entitled to initiate the petitioner's ACR. The petitioner, the learned counsel submits, was never given any notice or an opportunity of putting forth his case before his ACR was down graded by another officer and therefore the whole action of the respondents in bringing down the petitioner's entry to that of 'average' which rendered him ineligible for being considered for promotion is wholly illegal, arbitrary and in grave violation of the principles of natural justice.

Sri A. Rajashekar Reddy, learned Assistant Solicitor General, however, submitted that since the petitioner was officially posted in 'R' Company, Major K.K. Singh had no authority to initiate his ACRs for the year 1994 and that therefore there was nothing wrong in initiating fresh ACR by the officer competent in this regard. The learned counsel also reiterated the averments made in the counter that the revised entry of ACR for 1994 was

communicated to the petitioner on 30.06.1995.

Having regard to the rival contentions, the following two points arise for consideration:

1. Whether revision of entry in petitioner's ACR for the year 1994 was preceded by a notice to the petitioner and if the answer is in the negative whether the action of the respondents in revising the petitioner's ACR is sustainable in law?
2. Whether on the pleadings and material available on record, the action of respondents in revising the petitioner's ACRs is valid in law?

Re-point No.1:

In the affidavit filed in support of the writ petition, the petitioner specifically pleaded as under:

"I submit that the Army Head Quarters issued proceedings No.B/33513/AG, PS 29(e) dated 18.01.1993 promulgating the criteria for promotion to all the ranks in the army other than officer cadre. As per para 6 of the said proceedings, I am eligible for promotion to the rank of Naib Subedar if five reports are rendered on me in the rank of Havaldar and out of which three should be above average and remaining two should be high average and also I should be recommended for promotion in the last three reports. I submit that I was given to understand that all my reports till 1993 are above average and even my confidential report for 1994 which was initiated by my initiating officer, I was graded as above average. However, my reviewing officer brought down my overall grading from above average to average. However, I was neither informed about any adverse reports nor my signatures are obtained on the ACR Form for 1994 against any adverse remarks presumably made by my reviewing officer. The confidential report of 1994 was rendered on me in October 1994. I was expecting my promotion to Naib Subedar early this year as I was of the

impression that I earned above average reports during the last five reporting years. This belief of mine was misplaced as the respondents commenced promoting my juniors w.e.f. 01.04.1995. One of the juniors who was promoted to the rank of Naib Subedar is 14535 a3 ANB/Sub Mati Ram Jat. Realizing that I have been superseded I made a representation in the form of a non statutory complaint to the respondents vide my letter No.40901/pers dated 15.04.1995. The respondents till to date did not give any reply to my complaint. However, in June 1995 the respondents made me submit a fresh ACR form for the year 1994 on the ground that the officer who rendered report on me for the year 1994 as initiating officer is not eligible to do so.”

In the counter-affidavit the 5th respondent stated as under:

“The statutory complaint against the rejected ACR of 1994 on the ground that is for a shorter period was not considered as it become no longer relevant after its rejection. The adverse remarks in the subsequent ACR which was relevant and found to be acceptable have been communicated to the petitioner on 30.06.1995 separately. The averment that the petitioner was not informed of the circumstance leading to initiation of second ACR during 1994 is wrong and incorrect. The ACR has been initiated correctly and the gradings are just, proper and are in accordance with law.”

While the petitioner admitted that in June 1995 the respondents asked him to submit the fresh ACR form for the year 1994 on the ground that the officer, who initiated ACR for the year 1994, was not eligible to do so, it is the pleaded case of the petitioner that before bringing down his overall grading from “above average” to “average” he was neither given a notice nor afforded an opportunity to put-forth his case against the proposed action.

From the rival pleadings, it appears that the petitioner was, in fact, asked to submit a fresh ACR application in June 1995 on the ground that the earlier initiating officer was not competent to make entry in the petitioner's ACR for the year 1994. However, the respondents failed to produce any material before this Court to show that apart from the said communication, there is any other communication by which the petitioner was informed about the proposed action to reverse the entry by downgrading it from "above average" to "average". The respondents also failed to produce any material to show that even after the reversal of the entry the same was communicated to the petitioner. The respondents, who are in the exclusive custody of the records, are under obligation to produce the same before this Court. Since the respondents failed to substantiate their pleadings by producing relevant material, it is reasonable for this Court to presume that except asking the petitioner to submit a fresh form of ACR for the year 1994, neither the petitioner was given any notice against the proposed action of down grading the entry nor was communicated with the revised entry.

In **State of Orissa vs. Binapani Devi**^[1], the Supreme Court held that even an administrative action involving adverse civil consequence shall be preceded by observance of principles of natural justice. This principle is reiterated by the Apex Court in a number of subsequent judgments, some of which are **A.K.Kraipak and Others vs. Union of India**^[2], **Maneka Gandhi vs. Union of India**^[3].

As the respondents failed to establish that the petitioner was afforded with any opportunity against the proposed action of revision of entry in the ACR to his detriment or that the petitioner was even subsequently communicated with the revised adverse remark, I have no hesitation to hold that the respondents' action in making adverse entry is in flagrant violation of principles of natural justice and is therefore rendered per se invalid.

Re – Point No.2:

In the counter affidavit of the respondents, they have sought to justify revision of entry in the petitioner's ACR for the year 1994 on the sole ground that the petitioner worked for a period of 20 days only in the year 1994, as against the stipulated period of 90 days which is required for enabling the superior officer to initiate A.C.Rs., of the subordinate officers. In this context it is relevant to refer to the letter addressed by Major K.K.Singh bearing No.40902/T Company dated 2.6.1995 to Hq.1 EME Centre. A reading of this letter shows that the headquarters appeared to have sought for the explanation of Major K.K.Singh for his making entry in petitioner's A.C.R., for the year 1994. In the said letter Major K.K.Singh explained the circumstances under which he initiated the A.C.R., of the petitioner for the year 1994. It is stated therein that the petitioner who was posted in III-Training Battalion 1 EME Centre on 16.4.1994 was interviewed by the Commanding Officer and was posted to 'R' Company. Major K.K.Singh then approached the Commanding Officer for posting the petitioner to 'T' Company as the former did not have any good clerk in the company commanded by him. It is claimed in the said letter that

the Commanding Officer verbally told Major K.K.Singh that the petitioner will be posted under him and on that basis the petitioner started working in the 'T' Company under the control of Major K.K.Singh. When the petitioner applied for "family accon" (family accommodation) in 'T' Company his name was placed at Serial No.45 on 18.4.1994 for seniority of allotment of accommodation. On 1.9.1994 the petitioner was allotted accommodation from company pool vide proceedings dated 12.9.1994. The petitioner was placed with battalion headquarters between 18.4.1994 and 27.2.1994 only for taking over charge of battalion head clerk since Nayab Subedar M.K.Ghatak was leaving on Casual Leave during that period. It is only on 10.9.1994 that the petitioner was given movement order (transfer) by the RS Company to work in 'T' Company. As per the direction of Battalion Commander he was posted to 'R' Company and he was not posted to battalion headquarters. Major K.K.Singh also made it clear in his letter that at the time of posting of the petitioner to 'R' Company the post of Company Commander was held by a JCO and therefore he was not competent to write an A.C.R., of JCO/NCO (the petitioner belongs to NCO cadre). Major K.K.Singh in the said letter further explained that in the absence of an officer in "RS" Company he had signed all accountable documents such as Rly Warrants/CV, and that even though the petitioner was posted to 'R' Company, he was fully exposed to Major K.K.Singh as far as his efficiency of work was concerned. In para-5 of his letter he stated that the Commanding Officer of his battalion who reviewed his A.C.R., was aware of the aforementioned facts and that he had reviewed the

A.C.R., of the petitioner without any comments on technical aspects.

During the course of the hearing of the writ petition the case was adjourned on 24.11.2006, 28.11.2006 and 5.12.2006 at the request of the learned counsel for the respondents for producing the record. Despite repeatedly adjourning the writ petition the respondents failed to produce the record. A pointed question was put to the learned counsel for the respondents, whether the petitioner worked under the Officer who revised his A.C.R., for the year 1994 for a period of stipulated 90 days. The learned counsel was unable to answer this question. Neither the authenticity nor the contents of the letter dated 2.6.1995 addressed by Major K.K.Singh are disputed by the respondents. This letter clearly establishes that though the petitioner was on paper transferred to 'R' Company, at the request of Major K.K.Singh the petitioner worked in 'T' Company under the direct control of Major K.K.Singh for more than 90 days i.e., from 16.4.1994, till 10.9.1994 except for a brief period between 18.4.1994 to 27.4.1994 during which time he worked at battalion headquarters. From these uncontroverted facts borne out from the letter dated 2.6.1995 addressed by Major K.K.Singh to the headquarters 1 of EME centre, it is clear that Major K.K.Singh who had the opportunity of assessing the efficiency of the petitioner had justifiably initiated the A.C.R., of the petitioner and made entry therein. This, coupled with the fact that the respondents failed to show that the petitioner worked under the officer who revised the petitioner's A.C.R., for the year 1994 for a minimum period of 90 days, leave the court with no option but to

conclude that the respondents acted wholly illegally and without any justification to revise the petitioner's A.C.R. It is axiomatic that an employee's A.C.R., can be initiated only by an officer who had the opportunity of assessing the performance of the employee for a reasonable period. Undisputedly the respondents have stipulated 90 days as the reasonable period for this purpose. Irrespective of the place to which the petitioner would have been transferred on paper, the fact remains that he worked under Major K.K.Singh during the relevant time for more than stipulated period. There was therefore no justification at all for the respondents to revise the A.C.R., of the petitioner. Even if the respondents felt that there were justifiable reasons to reverse the entry made in the petitioner's A.C.R., as already held in point No.1, it is incumbent upon them to have given notice and sufficient opportunity to the petitioner to defend himself, before any adverse entry is made. That course having not been followed, the action of the respondents in revising the entry in the petitioner's A.C.R., for the year 1994 cannot be sustained in law. This point is answered accordingly in favour of the petitioner.

In the result the action of the respondents in revising the entry in petitioner's A.C.R., for the year 1994 is declared as illegal. The petitioner is entitled to be considered for promotion to the rank of Naib Subedar ignoring the revised entry in his A.C.R., for the year 1994. Accordingly there shall be a direction to respondents 3 to 5 to consider the petitioner's promotion to the rank of Naib Subedar with effect from the date on which his immediate junior was promoted and in the event petitioner is

promoted, he shall be entitled to all the consequential benefits.

The writ petition is accordingly allowed with costs.

C.V.NAGARJUNA REDDY, J

Date: 23 .02.2007
Es/mdaa

[\[1\]](#) AIR 1967 SC 1269
[\[2\]](#) 1969(2) SCC 262
[\[3\]](#) (1978) 1 SCC 248